A Trip to the Courthouse: Part 2

continued from part 1

“For a hundred and eighty-six years America had an opt-in system of copyright,” Lessig began. “Copyright was not granted automatically but was limited to works that were published. And then only to those with notice. And then only to those published with notice that were deposited and registered promptly. And to those [published,] marked, deposited, and registered, the copyright still had to be renewed after 28 years. Under this system, nearly fifty percent of published work entered the public domain immediately and ninety-three percent within twenty-eight years.”

“Following the 1976 Copyright Act, that all changed and copyright was granted automatically, for a full term, as soon as a work was fixed in a tangible form. No longer was it necessary to published, deposit, mark, or renew. Copyright moved from an opt-in system to an opt-out. And under this system, zero percent of published work will enter the public domain for at least a hundred years.”

“This is a radical change — perhaps the most radical change — to copyright law, going from ninety-three percent of works going in the public domain to zero. And the result is a huge increase in ‘orphaned works’ — works whose copyright holder cannot even be located to ask permission.”

“In *Eldred v. Ashcroft*, the Supreme Court ruled that copyright only needed judicial review when the ‘traditional contours’ of copyright law were changed. This is clearly a change to copyright’s traditional contours and thus deserves a chance for judicial review.”

The government’s lawyer — slick, but not as slick as Lessig — argued that the Court was referring to only two traditional contours: the right to fair use (which allows things like the use of small snippets of copyrighted material and limited copies for educational use) and the “idea/expression dichotomy” (which says that you can’t copyright ideas but only a particular way of expressing them).

Lessig responded that this was absurd. If the government ruled that cartoons featuring the prophet Mohammed could not receive copyrights, the law would clearly be subject to First Amendment review, even though neither fair use nor idea/expression were touched. Similarly, the change from opt-out to opt-in deserves review.

There were three judges, as required by law to hear all federal appeals. The one on the right, who was live via satellite, didn’t say a word the entire time. The one on the left didn’t ask more than a question or two. The judge in the middle was responsible for most of the questions. And she did not appear to get it.

“How is this different from *Eldred*?” she asked.

A quarter of the way in to the argument, she handed a slip of paper to her aide. Her aide scurried away and came back with a thick document. She looked down at it and then looked up.

“You were the lawyer in *Eldred* as well,” she asked Lessig.

“Yes, your honor.”

“How is this different from *Eldred*?”

“In *Eldred*,” Lessig explained, trying again, “the issue was whether Congress could continue expanding the length of copyright in order to keep Mickey Mouse from going into the public domain. The Court — Justice Ginsburg channelling Justice Scalia — said that since Congress had been doing this forever they could keep doing it. But in this case, we’re talking about a new change, one that effects orphaned works — works for who the copyright holder cannot be located.”

“Which wouldn’t include Mickey Mouse, because every can find Disney?” the judge asked.

“Precisely,” Lessig replied.

During the government’s rebuttal, the judge asked who was lobbying against this change in copyright law. “Well,” the government’s lawyer replied, “um, I suspect it was people very much like the ones you see here today.” (“Yeah,” Lessig scoffed later, “I was testifying in Congress against the bill back when I was fifteen!”)

By the same token, the judge asked Lessig about what solutions to the problem he would expect were the law ruled unconstitutional. “There are many possible solutions,” Lessig replied, drawing a picture of a network of people fighting this issue in all branches of government. There was this lawsuit, of course, but there was also a bill introduced by local Congresswoman Zoe Lofgren to require a one-dollar renewal fee (based, Lessig did not say, on a *New York Times* op-ed he had written), there was a series of hearings by the U.S. Copyright Office on the orphaned works problem, which concluded “The orphan works problem is real. … Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.” and provided several proposals.

“Your time is up,” the judge said, before the red light saying his time was up had gone on, and Lessig quietly packed up his papers and filed out, half the courtroom following behind him.

“Congratulations,” Internet Archive founder Brewster Kahle (the man who Lessig is filing this lawsuit on behalf of) said to Lessig, shaking his hand and smiling broadly. Lessig smiled back, then posed politely for photos with Kahle and his associate Rick Prelinger. The well-wishers soon streamed out until it was just Lessig and his fellow law school lawyers. The smile disappeared from Lessig’s face. “They didn’t get it,” Lessig said downcast.

“Oh, I think they were getting it towards the end there,” one of the lawyers said, trying to cheer Lessig up. “No,” he replied, “they weren’t.” “Well,” another lawyer chimed in, “to write an opinion they’ll have to read the briefs and then they’ll see your argument.” “No,” he explained, “they can just tell a clerk which way to write the opinion and have them do it.”

“Actually, our best hope now is that they won’t write an opinion at all and then *Golan* [a related case in a different Circuit] will go the other way and then we’ll have a circuit split.” (A circuit split is when two different circuit courts rule different ways on the same issue. Usually the Supreme Court then has to step in to resolve the disagreement.)

“Well, at least your case didn’t have any flamethrowers,” someone said, trying to lighten the mood. But Lessig just wasn’t in the mood.

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